

## The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROYAL J. O'BRIEN,  
Plaintiff,  
v.  
MICROSOFT CORPORATION,  
Defendant.

NO. 2:19-cv-01625-RAJ

**PLAINTIFF'S RESPONSE TO  
MICROSOFT CORPORATION'S  
MOTION TO DISMISS COMPLAINT  
UNDER RULE 12(b)(6)**

**NOTED ON MOTION CALENDAR:  
December 6, 2019**

## **ORAL ARGUMENT REQUESTED**

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MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6)  
(2:19-cv-01625-RAJ)

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1                   I. INTRODUCTION

2                   Plaintiff Royal O'Brien ("O'Brien"), in his Complaint for patent infringement, has  
 3 provided more than sufficient notice about how Microsoft infringes the asserted claims.  
 4 O'Brien's claims identify with specificity the accused product (CldFlt.sys and attendant  
 5 software), and describe how each limitation from at least one claim of the asserted patents is  
 6 satisfied. Microsoft contends this is not enough. According to Microsoft, O'Brien needed to  
 7 provide not a plausible allegation of infringement but actual infringement contentions--  
 8 complete with pictures and claim charts--to avoid a 12(b)(6) Motion to Dismiss. Microsoft is  
 9 wrong.

10                  The technology at issue here--microfilters--is not ineffably complex, but it does have its  
 11 own language or jargon which within its own domain is very precise. O'Brien's identification  
 12 of a particular minifilter to which Microsoft has assigned an altitude is a very pointed and  
 13 narrow accusation<sup>1</sup>. Not satisfied with this very precise accusation, Microsoft, instead, asserts a  
 14 need for a claim chart including a description of where the limitations can be found in the  
 15 accused product, yet such a description is more than is required under controlling Federal  
 16 Circuit law.

17                  The Federal Circuit, the circuit responsible for a uniform body of patent law, has heard  
 18 and pronounced on the issue of *Iqbal/Twombly* in the context of patent infringement. Had  
 19 Microsoft cited that law--it did not--Microsoft would have seen that its Motion could not be  
 20 supported. So, while controlling Federal Circuit authority requires only that the complaint give  
 21 "the defendant fair notice of what the ... claim is and the ground upon which it rests,"<sup>2</sup> O'Brien  
 22 did much more than that, identifying the specific accused portion of the larger Windows®

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23                  <sup>1</sup> A file system minifilter driver developed to the Filter Manager model must have a unique identifier called an  
 24 altitude that defines its position relative to other minifilters present in the file system stack. Minifilter altitudes are  
 25 allocated by Microsoft based on minifilter requirements and load order groupa.

<sup>2</sup> *Disc Disease Solutions Inc. v. VGH Solutions, Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) (hereinafter, "VGH")  
 (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007)).

1 operating system and walking through the functionality of the accused minifilter and showing  
 2 where the limitations are met. Simply put, what Microsoft wants--detailed infringement  
 3 contentions--is just not required at the pleadings stage, and so, Microsoft's motion fails.

4                   II. STATEMENT OF ISSUE TO BE DECIDED

5                   Controlling Federal Circuit authority requires only that a patent infringement claim give  
 6 the accused infringer fair notice of what the claim is and the ground upon which it rests. The  
 7 parties agree that O'Brien's Complaint identifies Microsoft's specific accused product  
 8 CLDFLT.SYS, and explains how the accused minidriver interacts, infringingly, with the  
 9 Windows® operating system. The question to be decided is whether O'Brien's accusation of  
 10 CLDFLT.SYS is expressed with the level of specificity necessary to meet the requirement of  
 11 "a short and plain statement of the claim showing that the pleader is entitled to relief" under  
 12 Federal Rule of Civil Procedure 8.

13                   III. FACTUAL BACKGROUND

14                   On October 10, 2019, O'Brien filed a Complaint for infringement of his patent, U.S.  
 15 Patent 8,380,808 ("the '808 patent") in the United States District Court for the Western District  
 16 of Washington. In response, Microsoft has filed a 12(b)(6) motion fashioned as an  
 17 *Iqbal/Twombly* motion for failing to state plausible facts that show O'Brien has a claim against  
 18 Microsoft.

19                   It is not that O'Brien has not alleged infringement in the Complaint. In fact, the Parties  
 20 agree that O'Brien's Complaint identifies the patent, the independent claims, and the accused  
 21 instrumentality ("CLDFLT.SYS and its attendant technology").<sup>3</sup> Importantly, O'Brien does not  
 22 accuse the whole of the operating system as the Motion seems to assert<sup>4</sup> but, rather, O'Brien

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23                   <sup>3</sup> Dkt. 8, Motion, page 5, lines 5-8.

24                   <sup>4</sup> "Notably, the functionality provided by the Windows 10 product is nearly endless. As a result, Microsoft cannot  
 25 ascertain from the Complaint what lines O'Brien is drawing in his allegations as between the CLDFLT.SYS  
 minifilter and "attendant" software or technology, and the myriad other features of Windows 10." Dkt. 8, page 6,  
 lines 20-23.

1 accuses a very specific function within the system. Those familiar with the Windows®  
 2 Operating System are aware that “[t]he CLDFLT.SYS mini filter interacts with a Microsoft-  
 3 provided dynamic link library, CLDAPI.DLL, which includes a collection of subroutines  
 4 distributed with Windows 10.<sup>5</sup> When CLDFLT.SYS interacts with the operating system,  
 5 CLDAPI.DLL is loaded into memory in user mode and communicates with the mini filter  
 6 CLDFLT.SYS either by a global filter message port or by a file system control,  
 7 FSCTL\_HSM\_CONTROL, to invoke the same sort of partial selective transfer of data in  
 8 response to input or output commands.”<sup>6</sup> While Microsoft recognizes the accusation of  
 9 CLDFLT.SYS, it simultaneously asserts that what the Complaint contains is not a sufficiently  
 10 plausible identification of infringement by a specific part of the Windows® Operating System.

11 Microsoft asserts that the Complaint lacks sufficient factual allegations to prepare a  
 12 defense. In the instant Motion, Microsoft asserts that O’Brien has failed to link each limitation  
 13 of each claim to specific actions by the accused minifilter.<sup>7</sup> What Microsoft is requiring here is  
 14 a “A chart identifying specifically where each element of each Asserted Claim is found within  
 15 each Accused Device, including for each claim element that such party contends is governed  
 16 by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused  
 17 Device that performs the claimed function.”<sup>8</sup> This is commonly known as a claim chart and, in  
 18 the Western District, draws its name from Local Patent Rule 120(c). Microsoft asserts, and  
 19 does so without controlling authority, that because “the allegations in these paragraphs are  
 20 largely divorced from any particular claim limitation”<sup>9</sup>, Microsoft does not have notice of what  
 21 is being accused.

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<sup>5</sup> Dkt. \_\_\_\_\_, Declaration of Anthony Mason, ¶ 7.

<sup>6</sup> Dkt. 1, Complaint, ¶ 18.

<sup>7</sup> Dkt. 8, Motion, page 2, lines 17-23.

<sup>8</sup> Local Patent Rule 120(c), Western District of Washington.

<sup>9</sup> Dkt. 8, Motion, page 4, lines 15-16.

1       Those with ordinary skill in the art, in this case, ordinary skill in Windows®,  
 2 understand O'Brien accuses the “multiple clearly identifiable components in the current  
 3 version of Windows 10 [which] utilize the “Cloud Filtering API”, [] the mechanism that  
 4 Microsoft has documented for using the functionality of ‘CLDFLT.SYS’.”<sup>10</sup> Microsoft is  
 5 aware that the accused instrumentality “is a file system mini-filter driver that Microsoft has  
 6 added to Windows to enable sparse storage of files.<sup>11</sup> Specifically, when associated with a  
 7 “cloud storage service” such as Microsoft’s OneDrive product offering, CLDFLT.SYS permits  
 8 storage of a “stub” file that contains sufficient information for the contents of the file to be  
 9 retrieved from a remote storage location as needed.”<sup>12</sup> The Complaint unambiguously accuses  
 10 the “CLDFLT.SYS” as practicing the patent.”<sup>13</sup>

11 A. Content of O’Brien’s Complaint for Patent Infringement.

12       The ‘808 patent is titled “Dynamic Medium Content Streaming”<sup>14</sup>, and issued in 2013.  
 13 As the Background of the Invention section to the ‘808 patent states, “The on-demand  
 14 requester object includes a minifilter associated with a filter manager in an I/O stack. The  
 15 minifilter receives each I/O request from the application, references a table that includes at  
 16 least one address where each data pack required to fulfill each I/O request is located, and  
 17 determines if the data pack has been streamed to the system. The table may also include a size  
 18 indicator for each data pack.”<sup>15</sup>

19       CLDFLT.SYS is a Microsoft product and was first included in the 1709 release of  
 20 Windows 10<sup>16</sup>; there is little question that O’Brien sufficiently alleges Microsoft as a direct

22       <sup>10</sup> Dkt. \_\_\_\_\_, Declaration of Anthony Mason, ¶ 5.b.

23       <sup>11</sup> <https://docs.microsoft.com/en-us/windowshardware/drivers/install/components-of-a-driver-package>.

24       <sup>12</sup> Id., ¶ 11.

25       <sup>13</sup> Id., ¶ 26.

26       <sup>14</sup> Dkt. 1-1, Ex. 1, USP 8,380,808.

27       <sup>15</sup> Id., Col. 2, Lines 46-56.

28       <sup>16</sup> Dkt. \_\_\_\_\_, Declaration of Anthony Mason, ¶ 12; <https://docs.microsoft.com/en-us/windows/win32/cfapi/cloud-filter-reference>.

1 infringer.<sup>17</sup> Thus, the first element, i.e. the plausible accusation of Microsoft as an infringer as  
 2 that term is defined under the “makes, uses, offers to sell, or sells any patented invention”<sup>18</sup>  
 3 mantra has been fulfilled.

4 O’Brien’s Complaint explicitly alleges that CLDFLT.SYS infringes Claims 1 and 14 of  
 5 USP 8,380,808.<sup>19</sup> It is hard to imagine that the language of the Complaint would be  
 6 meaningless to the leading developer of personal-computer software systems and  
 7 applications.<sup>20</sup> While not conceding that a full claim chart, as is properly required by Local  
 8 Rule 120(c) (to be produced “[w]ithin 15 days of the Scheduling Conference or, if there is no  
 9 Scheduling Conference, entry of the case schedule”<sup>21</sup>) needs now to be disclosed, O’Brien  
 10 supplies the following chart to demonstrate that even if Microsoft were justified in requiring a  
 11 specific identification of infringement, it is present in the Complaint lacking only a tabular  
 12 format:

13 1. A streaming on demand system comprising 14 an on-demand requester object installed on a 15 computing device, said on-demand requester 16 object being configured to receive I/O 17 requests on behalf of an application for which 18 data is available in data packs for streaming 19 delivery, said on-demand requester object 20 being responsive to application I/O requests, 21 said application I/O requests corresponding to 22 sequential and non-sequential data packs,	Microsoft has formulated an HSM minifilter having the current name CLDFLT.SYS and has assigned it an altitude of 180,451, placing it just beneath and therefore ahead of the BitRaider minifilter at 182,100. Just as does the Bitraider minifilter, the CLDFLT.SYS minifilter manages the communication between applications and the interfaces provided by device drivers. The Cloud Filter API provides functionality at the boundary
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23  
 17 Dkt. 1, Complaint, ¶ 16.

24 18 35 U.S.C. § 271, Infringement of Patent.

25 19 Dkt. 1, Complaint, ¶ 20.

20 <https://www.britannica.com/topic/Microsoft-Corporation>.

21 Local Patent Rule 120(c), Western District of Washington.

1 2 3 4	between the user mode and the file system. This API handles creation and management of placeholder files and directories. Complaint, ¶ 15.
5 said data packs being portions of a complete 6 data stream, said I/O requests determining an 7 order in which data packs are sought for the 8 application, 9 10 11 12 13 14 15 16 17 18	Another included function, HsmfRForPreRead indicates whether file data is present and where it is, makes that data available to fulfill an I/O Request by the I/O manager. If the data is not present, CLDFLT.SYS asks for the data to be populated by initiating the function HsmpRecallInitiateHydration. Hydrating an object is taking an object that exists in memory, that doesn't yet contain any domain data ("real" data), and then populating it with domain data (such as from a database, from the network, or from a file system). Complaint ¶ 20.
19 said on-demand requester object comprising a 20 minifilter associated with a filter manager in 21 an I/O stack, said filter manager being 22 configured to call the minifilter, 23 24 25	When CLDFLT.SYS interacts the operating system, CLDAPI.DLL is loaded into memory in user mode and communicates with the mini filter CLDFLT.SYS either by a global filter message port or by a file system control, FSCTL_HSM_CONTROL, to invoke the same sort of partial selective transfer of data

1 2	in response to input or output commands. Complaint ¶ 19.
3 said minifilter having a preoperation callback 4 routine for the I/O request registered with the 5 filter manager, 6 7 8 9 10 11 12 13 14 15 16 17 18 19	One such infringing action is performed by one of the calls included within the CLDFLT.SYS, namely HsmRecallTransferPlaceholders. The CLDFLT.SYS mini filter interacts with a Microsoft-provided dynamic link library, CLDAPI.DLL, which includes a collection of subroutines distributed with Windows 10. When CLDFLT.SYS interacts with the operating system, CLDAPI.DLL is loaded into memory in user mode and communicates with the mini filter CLDFLT.SYS either by a global filter message port or by a file system control, FSCTL_HSM_CONTROL, to invoke the same sort of partial selective transfer of data in response to input or output commands. Complaint ¶ 19.

1 and said minifilter being configured to receive 2 each I/O request from the application, said 3 minifilter being further configured to 4 reference a table that includes names and 5 paths with at least one offset address and 6 length where each data pack required to fulfill 7 each I/O request is located,	Evoking, for example, the included call CfGetPlaceholderRangeInfo effects the retrieval of the claimed table (Independent Claims 1 and 14) of the layout information as it is being maintained by the driver. Complaint ¶ 20.
8 said minifilter being further configured to 9 determine if the data pack has been streamed 10 to the system, and said application being a 11 program configured to use the data packs that 12 fulfill each I/O request when the data packs 13 are available on the computing device.  14 15 16 17 18	The function HsmRecallTransferPlaceholders effects the copying of placeholder data into a return buffer. Another included function, HsmfRForPreRead indicates whether file data is present and where it is, makes that data available to fulfill an I/O Request by the I/O manager. If the data is not present, CLDFLT.SYS asks for the data to be populated by initiating the function HsmpRecallInitiateHydration. Complaint ¶ 20.

19 However, if Local Patent Rule 120 has any purpose whatsoever, it is fair to assume that  
20 the standard for disclosure set out there must, by inference, be less than the standard for  
21 disclosure set out in Rule 8. If the two were equivalent, there would be no purpose for Rule  
22 120(c) as every Complaint will need to include the exact same information in the same form to  
23 survive a 12(b)(6) motion. Given that the Complaint includes a particularized accusation of  
24 CLDFLT.SYS rather than simply an accusation of the whole of the Windows® operating  
25

1 system, it is particular, factual, and plausible. Yet, the Motion recognizes the particular  
 2 accusation of a specific minifilter functioning at a specific altitude that Microsoft itself  
 3 assigned is not vague or ambiguous. Microsoft must be charged with knowledge of the  
 4 minifilter as Microsoft maintains a comprehensive list of current altitude assignments and  
 5 publishes the same.<sup>22</sup> The Motion asserts that because of the complexity of Windows® there is  
 6 no practical way to accuse any part of the operating system without providing a claim chart in  
 7 the Complaint. That Microsoft elects to infringe in an arcane and technical field, however, does  
 8 not shift the Rule 8 requirement of “a short and plain statement” to a claim chart as necessary  
 9 to put Microsoft on notice of O’Brien’s allegation of infringement. Yet, because the parties  
 10 agree that CLDFLT.SYS is accused, not the whole of the operating system, the Complaint  
 11 certainly meets *Iqbal/Twombly*.

#### 12 IV. DISCUSSION

13 The standard is as set forth in Federal Rule of Civil Procedure 8(a): a pleading that  
 14 states a claim for relief needs only to contain “a short and plain statement of the claim showing  
 15 that the pleader is entitled to relief.” So although a complaint “must have sufficient factual  
 16 allegations to state a claim to relief that is plausible on its face,” “detailed factual allegations  
 17 are not required.”<sup>23</sup> Indeed, “the statement need only give the defendant fair notice of what the  
 18 ... claim is and the ground upon which it rests.”<sup>24</sup>

19 A. O’Brien’s Direct Infringement Allegations Go Beyond the Requirements of Controlling  
Federal Circuit Authority.

20 A Rule 12(b)(6) motion in any civil case is analyzed under the standard announced in  
 21 *Bell Atlantic Corp. v. Twombly*.<sup>25</sup> To survive a Rule 12(b)(6) motion, the plaintiff must state a  
 22

23 <sup>22</sup> <https://docs.microsoft.com/en-us/windows-hardware/drivers/ifs/allocated-altitudes>.

24 <sup>23</sup> *XpertUniverse, Inc. v. Cisco Systems, Inc.*, Case No. 17-cv-03848-RS, 2017 WL 4551519, at \*3 (N.D. Cal. Oct. 11, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

25 <sup>24</sup> *VGH*, 888 F.3d at 1260 (quoting *Erickson*, 551 U.S. at 93; *Twombly*, 550 U.S. 544).

<sup>25</sup> 550 U.S. 544 (2007). *Iqbal*, 556 U.S. at 678-79.

1 claim that is “plausible on its face.” A claim is plausible on its face “when the plaintiff pleads  
 2 factual content that allows the court to draw the reasonable inference that the defendant is  
 3 liable for the misconduct alleged.”<sup>26</sup> The complaint “must contain sufficient factual matter,  
 4 accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>27</sup> The facts in the  
 5 Complaint must “raise a right to relief above the speculative level,” and into the “realm of  
 6 plausible liability.”<sup>28</sup> In other words, the complaint must allege enough facts to move past  
 7 possibility and on to plausibility of “entitlement to relief.”<sup>29</sup>

8 Determining whether a complaint states a plausible claim for relief [is]...a  
 9 context-specific task that requires the reviewing court to draw on its judicial  
 10 experience and common sense. But where the well-pleaded facts do not permit  
 11 the court to infer more than the mere possibility of misconduct, the complaint  
 12 has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.”<sup>30</sup>

13 While a complaint attacked by a Rule 12(b)(6) motion needs only to set forth detailed  
 14 factual allegations to survive, Microsoft instead demands that O’Brien provide its detailed  
 15 infringement contentions in its Complaint. Microsoft relies only upon *Iqbal/Twombly*  
 16 precedent decided outside of the context of patent infringement cases to assert that a claim  
 17 chart is necessary. But within the context of patent law, the Federal Circuit has considered  
 18 *Iqbal/Twombly* and has expressly held that a limitation-by-limitation analysis is unnecessary.  
 19 In *Disc Disease Solutions Inc. v. VGH Solutions, Inc.* (“VGH”)<sup>31</sup>, the plaintiff asserted a patent  
 20 with a number of detailed limitations describing a spinal brace. The complaint identified the  
 21 defendant’s products, and attached a photograph of them. The plaintiff’s sole factual  
 22 infringement allegation was that the defendant’s products “meet each and every element of at

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<sup>26</sup> *Id.* at 678 (citing *Twombly*, 550 U.S. at 556); *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Fields v. Dep’t of Pub. Safety*, 911 F. Supp. 2d 373, 383 (M.D. La. 2012) (Jackson, J.).

<sup>27</sup> *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

<sup>28</sup> See *Twombly*, 550 U.S. at 555.

<sup>29</sup> *Id.* at 558.

<sup>30</sup> *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)) (internal citation omitted); see also *Gonzales*, 577 F.3d at 603 (same).

<sup>31</sup> *Disc Disease Solutions Inc. v. VGH Solutions, Inc.* 888 F. 3d 1256 (CAFC 2018).

1 least one claim of the ‘113 ... Patent, either literally or equivalently.’<sup>32</sup> The defendant moved to  
 2 dismiss the patentee’s infringement claim under Rule 12(b)(6) and the District Court granted  
 3 the motion.<sup>33</sup>

4       The Federal Circuit reversed because, even though the plaintiff’s allegations simply  
 5 stated that the limitations were met, the technology was sufficiently simple *that the defendant*  
 6 *was on notice of the claim.* The Federal Circuit put it this way: “This case involves a simple  
 7 technology,” and as a result, the plaintiff’s simple allegations were “sufficient under the  
 8 plausibility standard of *Iqbal/Twombly*.” The Federal Circuit held that the complaint must  
 9 provide fair notice, not evidentiary infringement contentions. “[The patentee’s] disclosures and  
 10 allegations are enough to provide [defendant] fair notice of infringement of the asserted  
 11 patents. The district court, therefore, erred in dismissing [patentee’s] complaint for failure to  
 12 state a claim.”<sup>34</sup> As the Supreme Court has explained, the plausibility requirement is not akin to  
 13 a “probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a  
 14 reasonable expectation that discovery will reveal” that the defendant is liable for the  
 15 misconduct alleged.<sup>35</sup>

16       Microsoft appears to argue, without support, that O’Brien was required to state his  
 17 entire infringement analysis and theory in his Complaint, including dependent claims.<sup>36</sup>  
 18 However, there is no such requirement, nor do the cases cited by Microsoft support such a  
 19 requirement. In making Microsoft’s argument that it should be entitled to notice at the pleading  
 20 stage, it enlarges the definition of notice to entitle it, as well, to a chart of claim limitations of

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 23       <sup>32</sup> 888 F.3d at 1258.

24       <sup>33</sup> Id. at 1258-59.

25       <sup>34</sup> Id. at 1260.

26       <sup>35</sup> *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1341 (Fed. Cir. 2012)  
 (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 556 (2007)).

27       <sup>36</sup> Dkt. 8, Motion, page 7, lines 12-14.

1 specific claims and designation of the precise mechanism wherein the limitation is present is  
 2 belied by both the local patent rules and Federal Circuit authority.”<sup>37</sup>

3 Like the Federal Circuit, the Northern District of California has concluded that what  
 4 Microsoft demands--infringement contentions--are not required at the pleading stage.<sup>38</sup> Under  
 5 substantially similar Patent Rules, the Northern District of California is not inclined to belabor  
 6 the Rule 12 motion practice.<sup>39</sup> And, the Northern District is not alone in this.<sup>40</sup> In, for example,  
 7 *XpertUniverse*, the accused infringer moved to dismiss the patentee’s direct infringement  
 8 claims, arguing that the patentee did “not allege with specificity how each product  
 9 incorporates” the accused technology. The Court denied the motion and held that the patentee’s  
 10 purely text-based allegations (i.e. lacking any claim chart) about how the accused product  
 11 corresponded to the limitations of an exemplary claim satisfied Rule 12(b)(6).<sup>41</sup> In so holding,  
 12 the Court noted that “[i]n the context-specific task of reviewing a complaint for plausibility, ‘a  
 13 formal charting of claim elements against each accused product’ is not always necessary.”<sup>42</sup>

14 Until its recent abrogation, the Federal Circuit relied on former Rule 84, which  
 15 provided that the Appendix of Forms would suffice for the Federal Rules of Civil Procedure.  
 16 Form 18, a sample complaint for patent infringement, required only five allegations: (1) a  
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18 <sup>37</sup> *Windy City Innovations, LLC v. Microsoft Corp.*, 193 F. Supp. 3d 1109, 1115 (N.D. Cal. 2016).

19 <sup>38</sup> See *XpertUniverse*, 2017 WL 4551519, at \*5.

20 <sup>39</sup> See *Avago Techs. Gen. IP (Singapore) PTE Ltd. v. Asustek Computer, Inc.*, No. 15-CV-04525-EMC, 2016 WL 1623920, \*4 (N.D. Cal. Apr. 25, 2016) (Moreover, this District generally has not required detailed infringement theories until the time that infringement contentions are served, which is typically several months after a complaint has been filed).

21 <sup>40</sup> See, e.g., *InCom Corp. v. Walt Disney Co.*, 2016 U.S. Dist. LEXIS 71319, \*8 (C.D. Cal. Feb. 4, 2016) (Where a complaint identifies the defendant’s “products and alleg[es] that they perform the same function as Plaintiff’s patented system,” it passes muster under Rule 8); *Telebrands Corp. v. Ragner Tech Corp.*, 2016 U.S. Dist. LEXIS 114436, \*10 (D.N.J. Aug. 25, 2016) (“[T]he Court rejects Telebrands’ invitation to make claim identification a requirement under Federal Rule of Civil Procedure 8(a) for every patent-infringement complaint given a review of the persuasive case law.”); *InsideSales.com, Inc. v. SalesLoft, Inc.*, No. 2:16CV859DAK, 2017 WL 2559932, \*4 (D. Utah June 13, 2017); *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 14-cv-0772-GMN-NJK, 2016 WL 199417, \*2 (D. Nev. Jan. 15, 2016).

22 <sup>41</sup> Id.

23 <sup>42</sup> Id. (even while noting that the patentee’s mapping of claim elements was in ¶¶ 79-87 of the complaint).

1 statement of jurisdiction; (2) a statement that the plaintiff owned the asserted patent; (3) a  
 2 statement that the defendant had been infringing the patent by making, selling, and/or using an  
 3 accused device; (4) a statement that the plaintiff had given the defendant notice of its  
 4 infringement; and (5) a demand for injunctive and/or monetary relief. Indeed, the Federal  
 5 Circuit has also expressly rejected this argument, including recently.<sup>43</sup> Nor has Microsoft  
 6 presented any such Federal Circuit or Supreme Court decision overturning this. Thus, without  
 7 any overturning law, the Federal Circuit's holding that the specific infringement contentions are  
 8 not required.

9 In 2012, in *In re Bill of Lading*<sup>44</sup>, the Federal Circuit acknowledged that Form 18 might  
 10 have only presented a “bare allegation” of direct infringement, but stood by its conclusion in  
 11 *McZeal*,<sup>45</sup> that a patent infringement complaint which followed Form 18 would survive a  
 12 motion to dismiss. The Federal Circuit stated to the extent any conflict existed between  
 13 *Twombly* and the Forms, the Forms would control. The Federal Circuit therefore did not need  
 14 to decide whether minimum compliance with Form 18 ever falls short of *Twombly*'s  
 15 plausibility standard.

16 There is no doubt that O'Brien's allegations are more detailed than the allegations the  
 17 Federal Circuit found appropriate in *VGH*, thus, are sufficient under controlling Federal Circuit  
 18 authority. Yet, O'Brien went further than required under *VGH* by describing how  
 19 CLDFLT.SYS interacts with the existing Filter Manager and the I/O Manager in the Windows  
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21 <sup>43</sup> *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed.Cir.2000) (reversing district court  
 22 order, which dismissed a complaint with leave to amend to include specific allegations about each element of the  
 23 claims of the asserted patent); *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1377 (Fed. Cir. 2017) (“we  
 24 have never recognized [] a distinction” or “difference between the requirements of Form 18 and *Iqbal/Twombly*.”) (citing *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1284 (Fed. Cir. 2013) (“That Form  
 25 18 would control in the event of a conflict between the form and *Twombly* and *Iqbal* does not suggest, however,  
 that we should seek to create a conflict where none exists.”)).

<sup>44</sup> *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1341 (Fed. Cir. 2012)  
 (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 556 (2007)).

<sup>45</sup> *McZeal v. Sprint Nextel Corp.*, 501 F. 3d 1354 (CAFC 2007).

1 architecture. So, for instance, in accusing an instrumentality under the ‘808 patent, O’Brien  
 2 identified “an HSM minifilter having the current name CLDFLT.SYS”, surely O’Brien’s  
 3 allegation that Microsoft “has assigned it an altitude of 180,451, placing it just beneath and  
 4 therefore ahead of the BitRaider minifilter at 182,100” is sufficient to put Microsoft on notice  
 5 as to exactly what instrumentality is being accused.

6 And, what does Microsoft know of Windows® and CLDFLT.SYS? As indicated by  
 7 Mr. Mason, “[a] search of Microsoft’s public facing website quickly identifies the presence of  
 8 the name CLDFLT.SYS (<https://docs.microsoft.com/en-us/windows-hardware/drivers/ifs/allocated-altitudes>). From this, it becomes clear that this is a file system  
 9 filter driver, registered to Microsoft Corporation.”<sup>46</sup> The Federal Circuit has held that the  
 10 complaint must provide fair notice, not evidentiary infringement contentions. “[O’Brien’s]  
 11 disclosures and allegations are enough to provide [Microsoft] fair notice of infringement of the  
 12 asserted patents.”<sup>47</sup> The standard is not one of putting some stranger to the technology on  
 13 notice but, specifically, to put Microsoft, as defendant, on notice. Where the information is  
 14 drawn from Microsoft’s own website, is it unfair to charge Microsoft with that knowledge?

15 It is certainly fair to assume that Microsoft knows that CLDFLT.SYS is “a file system  
 16 mini-filter driver that Microsoft has added to Windows to enable sparse storage of files.  
 17 Specifically, when associated with a ‘cloud storage service’ such as Microsoft’s OneDrive  
 18 product offering, it permits storage of a ‘stub’ file that contains sufficient information for the  
 19 contents of the file to be retrieved from a remote storage location as needed.”<sup>48</sup> The industry is  
 20 certainly aware that such is what CLDFLT.SYS does. That knowledge alone addresses several  
 21 of the limitations of either of Claims 1 or 14. In reviewing whether the Complaint does contain  
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 25<sup>46</sup> Dkt. \_\_\_\_, Declaration of Anthony Mason, ¶ 10.  
 47 888 F.3d at 1258.

<sup>48</sup> Dkt. \_\_\_\_, Declaration of Anthony Mason, ¶ 11.

1 adequate factual allegations, we know that those having ordinary skill in the art would find the  
 2 allegations to be sufficiently factual to understand what is being accused.

3 What is most disingenuous in Microsoft's position is that any of the limitations in either  
 4 of the independent claims (Claims 1 and 14) that do not explicitly refer to a "minifilter" were  
 5 presented as context and are inherently present in the Windows® architecture (e.g. Filter  
 6 Manager and I/O Manager). It is only the limitations relating to the minifilter that assert the  
 7 elements of novelty in the invention. For instance, asserting, as does the Motion, that in the  
 8 Complaint there is no detailed explanation as to how minifilters are loaded<sup>49</sup> is without merit.  
 9 That loading of the minifilters, however, is common to any installation even prior to the 1709  
 10 release of Windows 10.<sup>50</sup> That is what the Filter Manager does and is simply inherent in  
 11 Windows as part of its architecture.<sup>51</sup> There ought to be no need to point out to Microsoft how  
 12 its Filter Manager works.

13 At base, Microsoft's motion is really a request for discovery and a preview of  
 14 infringement contentions. Microsoft says as much: "The only analysis the Complaint provides  
 15 for these claims is found in paragraphs 19 and 20, where the Complaint refers to the 'claimed  
 16 structure of the patent in suit' and 'the method the patent claims set out.' But the allegations in  
 17 these paragraphs are largely divorced from any particular claim limitation, forcing Microsoft to  
 18 guess at what it does that O'Brien believes infringes claims 1 and 14."<sup>52</sup> The Complaint  
 19 expresses what the accused device does, using language common to the industry. As the  
 20 purpose of the complaint is to inform of the infringement, and because infringement charts are  
 21 not necessary for that purpose, the Complaint having a short clear statement of what is being  
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 24 <sup>49</sup> Dkt. 8, Motion, page 9, lines 16-19.  
 25 <sup>50</sup> Dkt. \_\_\_\_\_, Declaration of Anthony Mason, ¶ 18.

<sup>51</sup> <https://docs.microsoft.com/en-us/windowshardware/drivers/ifs/installing-a-minifilter-driver>.  
<sup>52</sup> Dkt. 8, Page 8, Lines 13-19.

accused in language Microsoft itself publishes, one is lead to the conclusion that the Complaint is adequate and that Microsoft's Motion should be denied.

B. O'Brien has Agreed with Microsoft to Withdraw his Intentional Infringement Claim Without Prejudice.

In discussion with Microsoft, O'Brien has agreed to withdraw his claim of intentional infringement and his prayer for enhanced damages pursuant to 35 U.S.C. § 284, which authorizes enhanced damages against infringers. The relevant portion of the statute states merely that a district “court may increase the damages up to three times the amount found or assessed”. The parties agree that this withdrawal is without prejudice to O'Brien's right to amend at a later date should discovery yield information to make the assertion appropriate. In the event that the Court determines amendment of the Complaint appropriate, O'Brien will amend the Complaint accordingly.

## V. ALTERNATIVE MOTION

In the event that the Court finds the Complaint deficient in its specific allegations accusing CLDFLT.SYS as infringing the ‘808 patent, O’Brien, moves, in the alternative, to be granted leave to amend the Complaint in a manner consistent with the findings of this Court. To do so works no prejudice to Microsoft at this early stage in the proceedings.

Certainly, should the Court find that more factual allegations are necessary, the proper means of addressing this deficiency would generally be to grant the Plaintiff leave to amend.<sup>53</sup> A complaint should not be dismissed under Fed.R.Civ.P. 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>54</sup> Dismissal under Fed.R.Civ.P. 12(b)(6) may be based upon “the lack of a cognizable

<sup>53</sup> If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff should be afforded the opportunity to amend the complaint before dismissal. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir.1983). If the claim is not based on a proper legal theory, the claim should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir.2009).

<sup>54</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

1 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”<sup>55</sup> But  
 2 given the lack of any procedural bar to refiling, the lack of any prejudice to Microsoft, and the  
 3 fact that Microsoft should certainly be adequately informed of the infringement based upon the  
 4 industry-wide use of the terms the Complaint contains,<sup>56</sup> dismissal of the instant action without  
 5 leave to amend would not be consistent with the ends of justice.

6 **VI. EVIDENCE RELIED UPON**

7 In support of its Response, Plaintiff relies on the Argument and Authorities herein, the  
 8 Declaration of William Anthony Mason (and exhibit attached thereto), and the pleadings and  
 9 documents previously submitted to the Court.

10 **VII. CONCLUSION**

11 For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant  
 12 Microsoft Corporation’s Motion to Dismiss Complaint Under Rule 12(b)(6).

13 DATED this 2nd day of December, 2019.

14 *s/ Mark Lawrence Lorbiecki*

15 Mark Lawrence Lorbiecki, WSBA #16796

16 *s/ Daniel A. Brown*

17 Daniel A. Brown, WSBA #22028

18 *s/ Scott B. Henrie*

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all CM/ECF participants who have appeared:

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DATED this 2nd day of December, 2019.

s/ Mark Lawrence Lorbiecki  
Mark Lawrence Lorbiecki, WSBA #16796

PLAINTIFF'S RESPONSE TO MICROSOFT CORPORATION'S  
MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6) - 18  
(2:19-cv-01625-RAJ)

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